No. 89-1985

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL, and NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,

*Petitioners,*

v.

HYDROSTORAGE, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONERS' REPLY BRIEF

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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

*CASES*



*STATUTES*

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## PETITIONERS' REPLY BRIEF

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In its Brief in Opposition, respondent misstates the first question presented, mischaracterizes the decision below, and misrepresents the statutory scheme involved in this case.

1. Respondent's first reason for opposing *certiorari* is that "the Ninth Circuit did not reach the question of whether and to what extent states are precluded by the preemption provisions of ERISA from requiring that public works contractors agree to provide apprenticeship training in accordance with state-mandated standards."

Respondent's Brief in Opposition ("Op. Br.") at 8. The plain language of the Ninth Circuit's opinion is precisely to the opposite.[1]

The Ninth Circuit held that the State's order at issue is preempted *because* that order requires certain employers to abide by state-mandated apprenticeship standards, and, according to the Ninth Circuit, the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, preempts such an order even though the order's requirements apply only to contractors on public works projects:

> Hydrostorage was sanctioned for failing to apply . . . for permission to train apprentices on the Lathrop project. The very purpose of requiring

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[1] Cal. Labor Code § 1777.5 is several pages long (Pet. App. 50a-53a) and covers many issues concerning the employment of apprentices on public works jobs other than the requirement that public works employers must agree to apply state-approved standards for hiring and training apprentices.

The Ninth Circuit had no reason to, and did not, adjudicate in this case any of those other aspects of § 1777.5, including: the provision that employers *may* employ "properly registered apprentices" upon public works if they choose to do so (Pet. App. 50a); the provision that apprentices "shall be employed only at the work of the craft or trade to which he is registered" (*id.*); the provision that joint apprenticeship committees "administering the apprenticeship standards . . . in the area of the site of the public work" ensure equal employment opportunity and affirmative action for women and minorities (Pet. App. 51a); and the provision requiring that in some instances contractors on public works jobs make payments to the California Apprenticeship Council, a state entity, to support apprenticeship programs (Pet. App. 53a). (The page number cites are the only ones available, since the relevant paragraphs and sentences of § 1777.5 are not preceded by numbers or letters.)

The Ninth Circuit, understandably, limited its preemption holding to the issues raised by the actual order before that court, and therefore did not purport to address the validity of every one of the many separate aspects of § 1777.5, including those not raised by the order being contested. Pet. App. 28a. But as shown in the text the Ninth Circuit *did* directly address the issue raised by the first question we have presented to this Court, since that Question *is* squarely raised by the order respondent contests.

> Hydrostorage to apply was so that Hydrostorage would become bound by the Standards, an ERISA plan. . . . By signing a DAS-7 form, Hydrostorage would agree "to train apprentices in the designated occupation in accordance with the *apprentice standards*" . . . . The "apprenticeship standards" in this case are the Standards, an ERISA plan. Thus, the order undoubtedly "relates to" an ERISA plan . . . .
>
> Section 1777.5 is aimed at enforcing the terms of an ERISA plan, the Standards. . . . We therefore conclude that the administrative order falls within ERISA's preemption clause. [Pet. App. 22a-23a (emphasis in original).][2]

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[2] Contrary to its contention before this Court that the Ninth Circuit held preempted *only* the requirement that "the employer sign an agreement with and participate in a specific program selected by the state" (Op. Br. at 9), Respondent has recently relied on the Ninth Circuit's ERISA preemption decision in this case as standing for a broader preemptive proposition. *See* Comment on Behalf of Hydrostorage Concerning Proposed New Amendments for Title 8; Ch. 2, Part I, California Code of Regulations Sections 201 and 227 Through 234. In objecting to proposed regulations by the California Apprenticeship Council designed to comply with the Ninth Circuit's decision in this case, Hydrostorage stated:

> The new proposed [regulation] permits contractors to request the dispatch of apprentices while stating that they will not follow applicable apprenticeship committee standards. Instead, the contractor agrees:
>
> > "To employ and train apprentices in accordance with the California Apprenticeship Council regulations governing employment of apprentices in public works projects."
>
> This simply means that every aspect of employment and training of apprentices will be under the direct control of state regulation. Such a system is certainly equally subject to a claim of ERISA preemption as that challenged in *Hydrostorage*. Further, the new proposed regulations continue to require a specific ratio of apprentices to journeymen. As found . . . in *Hydrostorage*, this kind of regulation of apprenticeship training programs is not permitted to the states. Thus, the current regulations directly contradict the holdings of the . . . Ninth Circuit . . . in *Hydrostorage*. [*Id.* at 5.]

The only clue in the Brief in Opposition as to why respondent believes, despite this explicit statement by the Ninth Circuit, that the court below did not decide "whether states are precluded . . . from requiring that public works contractors agree to provide apprenticeship training in accordance with state-mandated standards" is the statement that "the state did not simply set *minimum* standards for employment and training of apprentices." Opp. Br. 8-9 (emphasis supplied); *see also id.* at 9 (emphasis supplied) ("This is not a *minimum* standards requirement but a mandated program dictated in its every detail by the state.")

Neither our *Certiorari* Petition's first Question Presented nor the Petition itself, however, anywhere refers to "minimum" standards, as opposed to "mandated" or any other kind of standards. Rather, our basic point is that *ERISA does not preempt at all* the setting of standards for apprenticeship programs where the standards only apply to work to be performed by employees on state construction projects. Setting such standards for public works contracts, we maintain, simply is not state action that "purports to regulate" within the meaning of § 514(c)(2) of ERISA.[3]

The Ninth Circuit rejected this construction of the statute (Pet. App. 23a), and thereby held that ERISA *does* preempt statutes that simply prescribe and enforce contract terms for doing business set by the state as purchaser in the market place. It is this square holding

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[3] For example, when a state project is put out for bids, the building specifications included in the bid documents are not merely "minimums", but instead set out the precise standards which must be followed if the contract is awarded. Thus, if the document calls for a three story building one block square, the contractor cannot decide to build a six story building half a block square. Yet, one would not say that the state is "regulating" the height and breadth its own building; rather, the state is simply deciding what it wants built and how, contracting to have it built that way, and holding the contractor to the terms of its contract.

of the Ninth Circuit that we believe merits this Court's review.

2. The respondent's next two grounds for resisting *certiorari* are its assertions that (i) there is no conflict in, or confusion among, the circuits on whether the "purports to regulate" language of ERISA § 514(c)(2) in fact limits ERISA's preemptive scope; and (ii) even if there is, that split is immaterial because those courts that have given independent meaning to § 514(c)(2) are interpreting ERISA in a manner "directly contrary to decisions of this Court." Opp. Br. at 9. The first assertion is contrary to fact; the second, if true, would support rather than detract from the need for this Court to address the role of § 514(c)(2) in ERISA preemption analysis.

(i) The assertion that there is no circuit confusion or conflict on the question presented here is based upon the fact that *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985) and *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349 (9th Cir. 1986)—the cases that originally established that ERISA § 514(c)(2) states a separate preemption requirement and thereby limits the "relates to" language of § 514(a)—were decided in 1984 and 1986, and those cases have been superseded by later cases in this Court.

But neither the Second nor the Ninth Circuit have repudiated their earlier opinions in this regard. Indeed, the Ninth Circuit used the two-prong test battle in this case, and, in a case decided after the *Certiorari* Petition in this case was filed: *Retirement Fund Trust etc. v. Franchise Tax Board, et al.*, —— F.2d ——, —— (9th Cir., Nos. 88-6355 & 88-6415, July 16, 1990) the test for ERISA preemption encompasses *both* the "relates to" requirement of § 514(a) and the "purports to regulate" requirement of § 514(c)(2). *See also General Electric*

*v. Department of Labor*, 891 F.2d 24, 29 (2nd Cir. 1989), *cert. denied*, —— U.S. ——, 58 L.W. 3767 (June 4, 1990) (stating the § 514(c)(2) "purports to regulate" standard is part of ERISA's preemption test).

Moreover, the Fifth Circuit, only months ago, recognized that "the Ninth and Second Circuits have read § 514(c)(2)'s definition of 'state' to impose a limitation upon the 'relate to' language of § 514(a)". *Ironworkers v. Mid-South Pension Fund v. Terotechnology*, 891 F.2d 548, 552-53 (5th Cir. 1990). The Fifth Circuit without deciding whether that view is correct then applied the two-prong test to the case before it. *Id.* at 553; *see also Retirement Fund Trust, supra*, at n. 63 ("Not all courts have adopted this two-part test. *See Ironworkers* [*,supra*]; *Authier v. Ginsberg*, 757 F.2d 796, 799 n.4 (6th Cir., *cert. denied*, 474 U.S. 888 (1985)."); *Firestone v. Neusser*, 810 F.2d 550, 552-53 n.1 (6th Cir. 1987).

Thus, respondent's representations to the contrary notwithstanding, the two-prong theory of ERISA preemption certainly has not been abandoned by the circuits that had adopted that theory, and continues to perplex those circuits that have not yet squarely decided the issue.

(ii) It is respondent's position, however, that even if (as we established above) there is indeed circuit confusion and conflict upon the question whether there are two separate requirements for establishing ERISA preemption or only one, this Court should leave the circuit court law in disarray. According to Hydrostorage, the better view is that under this Court's cases, the circuits that apply only a single-pronged, "relates to" test are correct.

We would have thought this point to be one that argues *for certiorari*. Obviously, where a circuit conflict is the basis of a *certiorari* grant, this Court usually

adopts—with or without some elaboration or modification—one side of the split as the correct legal rule. The very reason for granting review in such cases is to restore uniformity among the circuits by informing all the lower courts of the correct legal rule.

Equally to the point, while we, of course, disagree that this Court's cases establish that the two-prong ERISA preempted theory is wrong, that position, if true, *supports* a grant of *certiorari*.[4] One basis for *certiorari* jurisdiction is "|w|hen . . . a United States court of appeal[] has decided . . . a federal question in a way that conflicts with the applicable decision of this Court." Rule 10.1 (c). The Ninth Circuit in this case *did* apply a two-prong theory of ERISA preemption, albeit, in our view, in a manner that does not do full justice to the

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[4] This Court has never considered directly a case raising the question whether ERISA § 514(c)(2) limits the operation of the ERISA preemption provision as a whole. Moreover, this Court has had no need to decide the issue since, in most cases, the result will be the same with or without the addition to the § 514(a) "relates to" test of § 514(c)(2)'s "purports to regulate" test. Only in the narrow but important class of cases, such as this one, in which a statute "relates to" an employee benefit plan but in no sense "regulates" the terms and conditions of that plan, does § 514(c)(2) place a limitation upon the operation of ERISA preemption that alters the outcome of the case.

The primary case respondent relies upon to demonstrate that this Court's cases are inconsistent with the two-prong theory is *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988). Op. Br. at 10. It does not appear, however, that the relevance of § 514(c)(2) was ever argued to the Court in *Mackey*, and that section is certainly not addressed in the relevant portion of the opinion. Further, under the interpretation of the "purport to regulate" provision for which we argued below and which we would present here were certiorari granted, the statute involved in *Mackey would* "purport to regulate" employee benefit plans, since that state statute established rules applicable to all employee benefit plans in the state, and was not limited to stating the terms upon which government entities would participtae in the marketplace.

"purport to regulate" prong.[5] Thus, if respondent is correct that this Court's cases are inconsistent with viewing § 514(c)(2) as placing *any* limitation upon the "relates to" standard of § 514(a), there is all the more reason to grant *certiorari* in this case.

3. Finally, respondent, taking issue with the analysis presented at pp. 15-21 of our *Certiorari* Petition, maintains that ERISA *does* preempt the California statute here, even though that statute governs only the work performed on public works projects. Op. Br. 15-16. We do not believe that anything respondent argues in this regard provides any warrant for reiterating our basic legal position, and therefore confine this reply to the following two points.

First, respondent is simply wrong in stating that "the provisions of section 1777.5 *by their terms do not take*

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[5] Because we agree with the Ninth Circuit that § 514(c)(2) has a separate role to play in ERISA preemption analysis but disagree with the exact meaning that court ascribes to the section, it is *not* true, as respondent suggests, that "[u]nder the narrowest application of the statute urged by Petitioners, the order would still be preempted by ERISA because it undeniably 'purports to regulate' apprenticeship plans." Op. Br. 10-11. The Ninth Circuit's construction ignores the distinction between "regulation" and state market place participation, as we explain in our *Certiorari* Petition (at 15-21).

Nor does this Court's summary affirmance after the filing of a jurisdictional statement in *Local Union 598, Plumbers & Pipefitters Journeymen & Apprentices Training Fund v. The J.A. Jones Construction Co.*, 846 F.2d 1213 (9th Cir.), *affirmed* —— U.S. ——, 109 S. Ct. 210 (1988) suggest that this Court has accepted the construction the Ninth Circuit has placed upon the "purports to regulate" prong of the ERISA preemption standard. The Ninth Circuit opinion in *J.A. Jones* did not discuss whether the state's role as market participant precluded a finding that the state was "regulating" the contractors who agreed to its contracting terms. Consequently, this Court's summary affirmance, which must be construed as narrowly focused upon the issues actually raised and decided below, did not address that question either. *See Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

*effect until after the contract has been awarded.*" Op. Br. at 15, 16 (emphasis in original). The statute provides:

> The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor. [Pet. App. 53a.]

Further, the contract Hydrostorage signed did contain provisions binding Hydrostorage to abide by the requirements set by § 1777.5. Answer, Attachment A, p.1c ("*Apprenticeship Requirements*: Contractor agrees to comply with Section 1777.5, 1777.6 and 1777.7 of the California Labor Code relating to the employment of apprentices. . . .")

Second, respondent (like the Ninth Circuit) maintains that the State is "regulating" public works contractors because the statute "subjects the employer to mandatory ongoing obligations" and provides for penalties other than debarment, including fines. Opp. Br. 15-16; *see also* Pet. App. 23a (the State is regulating public works contractors because "[t]he state's involvement does not end with the awarding of the contract" but, instead, includes "monitor[ing] and enforc[ing] violations . . .").

But *all* executory contracts establish "ongoing obligations"—ongoing, at least, until the terms of the contract have been fulfilled, which is the duration of the obligations established by § 1777.5.[7] Yet, one does not ordinarily say that a party that contracts for the performance of services is "regulating" the service provider by enforcing complete performance according to the contrac-

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[7] That is, nothing in the statute requires public works contractors to employ and train apprentices, or to abide by any particular apprenticeship standards, before or after the particular public works project covered by the contract is over.

tual terms, or by collecting pre-set penalties for a failure to perform as promised.

In short, the statutory scheme here at issue simply states one of the services California wishes all public works contractors to supply—*viz.*, providing training opportunities for state-registered apprentices—and specifies how that service is to be provided. As such, the scheme is no more "regulation" than are the blueprints for the building projects or the time schedules established for completing those projects.

## CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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